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Webinar

## UK Employment Law Update – September 2015

Paul Callegari, Partner and Practice Group Co-Ordinator –  
Labor, Employment and Workplace Safety

## Presenter



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## Agenda

1. In case you missed it...
2. Feature: jurisdiction conflict – the Court of Appeal flexes its muscles in *Petter v EMC Corporation*
  - Martin King, Special Counsel, Commercial Disputes
3. In the pipeline: the Modern Slavery Act 2015
4. Q&A

## In case you missed it...

- Subject Access Requests – *Dawson-Damer & Ors v Taylor Wessing LLP & Ors* (High Court)
  - TW's client (since 1987) is a Bahamian trustee company involved in administering multi-million dollar family trust
  - Claimants involved in litigation in Bahamas against trustee
  - Claimants issued subject access request to TW
  - TW refused to comply on grounds of legal professional privilege so Claimants sought orders requiring TW to do so

## In case you missed it...(cont.)

- High Court refused application on grounds that it was not reasonable or proportionate for TW to carry out lengthy and costly searches of files to determine whether legal professional privilege applied
- Purpose of DSAR to check whether privacy unlawfully infringed, not to obtain documents for litigation against third parties
- TW's manual records (pre 2005) fell outside scope of "relevant filing system" in any event
- Case appealed

## In case you missed it...(cont.)

- Role of HR in disciplinary investigations:  
*Ramphal v Dept. of Transport (EAT)*
  - Allegations of misuse of hire car and company credit card made against R
  - G appointed to investigate, disciplinary hearing 13 August 2012
  - G sent draft report to HR on 11 September 2012 – critical but favourable findings to R, e.g. misuse not deliberate, persuasive argument in relation to fuel expenditure. G recommended final warning

## In case you missed it...(cont.)

- Six months of discussions between G and HR led to report being more critical and G's findings changed to summary dismissal for gross misconduct. R dismissed and claimed unfair dismissal
- ET: fair. EAT: overturned. Supreme Court authority: HR should limit advice to law and procedure not culpability. G alone should have decided on culpability
- HR need to be careful – significant influence in outcome will compromise fairness

## In case you missed it...(cont.)

- Agency workers: right to be informed of vacancies – *Coles v Ministry of Defence (EAT)*
  - Regulation 13(1) of Agency Workers Regulations 2010 gives right to be informed of vacant posts with end user (hirer)
  - C's role advertised as vacant during redeployment exercise. Post visible to all internal candidates including C, who did not look at advertisement or apply for post
  - Internal applicant successfully applied; C's assignment ended

## In case you missed it...(cont.)

- C claimed breach of AWR
- ET and EAT: AWR give nothing more than right to be informed; no right to be considered alongside existing employees
- Equivalent rights does not mean parity of status

## In case you missed it...(cont.)

- Dismissal for comments made on Facebook – *Smith v British Waterways Board EAT*
  - S employed as part of maintenance team – raised complaints about working conditions and colleagues resulting in mediation in 2013
  - S's manager disclosed derogatory and disparaging comments made by S about BWB in 2011 on Facebook, contrary to express provisions of social media policy. S dismissed
  - EAT: dismissal fair despite time having passed
  - Emphasises importance of clearly drafted social media policy

## In case you missed it...(cont.)

- In brief
  - Government consultation on simplifying tax treatment of termination payments
  - Unison's challenge to Tribunal fees fails – again (but note Scottish position!)
  - Research on pregnancy and maternity related discrimination published
  - Research: air conditioning units designed for body temperature and metabolism of men!



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## Petter v EMC Corporation [2015]

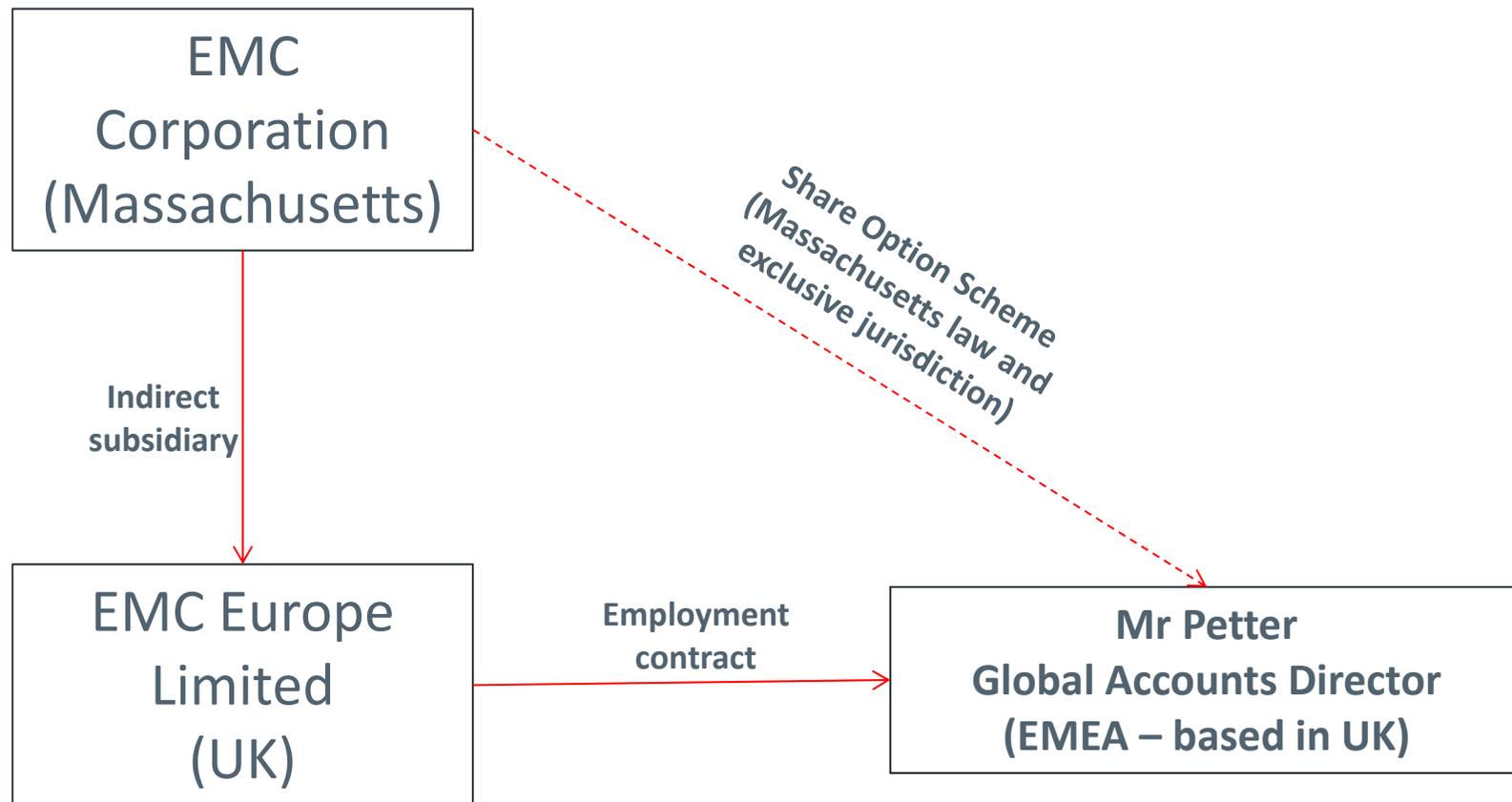
**Application of The Brussels Regulation 1215/2012 – Arts. 20-25**

## Presenter



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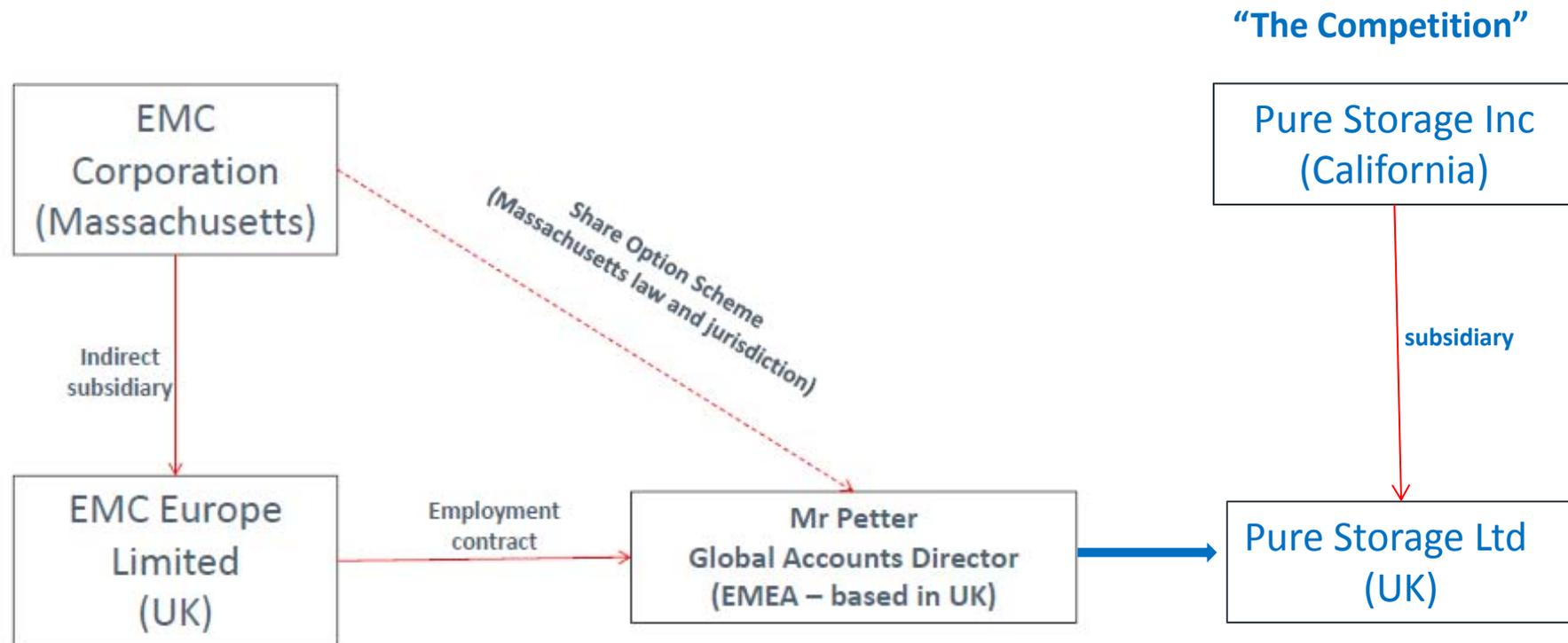
# CONTRACTUAL ARRANGEMENT



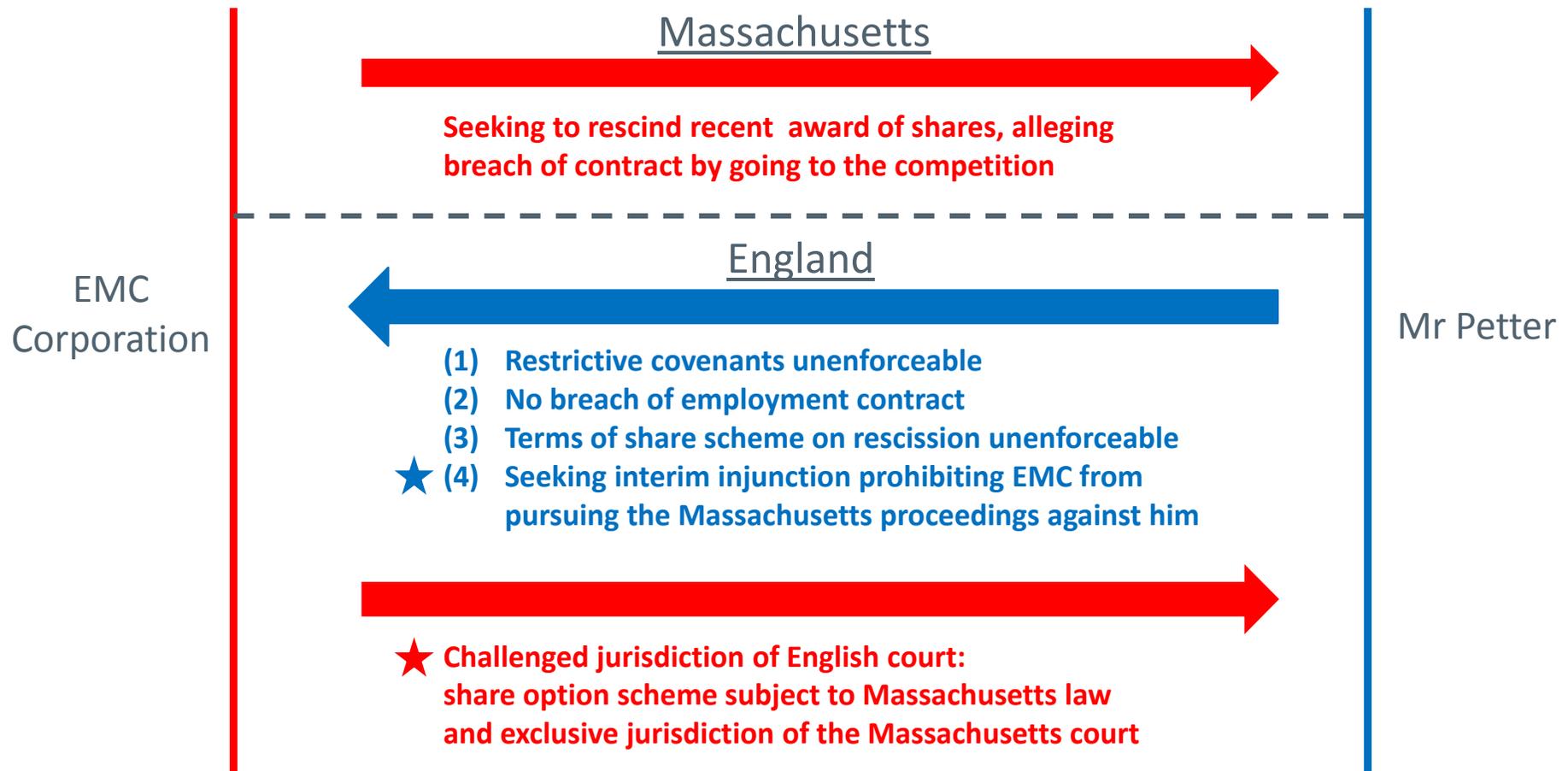
## THE BRUSSELS REGULATION JURISDICTION IN MATTERS "RELATING TO" CONTRACTS OF EMPLOYMENT

- Article 20(2) - Where an employee enters into a contract of employment with an employer not domiciled in a Member State but has a branch, agency or other establishment in a Member State, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that that Member State
- Article 21(1) – An employer domiciled in a Member State may be sued: (a) in the courts of the Member State in which he is domiciled; or (b) in another Member State in the courts ...where...the employee habitually carries out his work...
- Article 22(1) – An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled
- Article 23(1) – [These] provisions may be departed from only by an agreement which is entered into after the dispute has arisen...
- Article 25(4) – Agreements...conferring jurisdiction shall have no legal force if they are contrary to Articles...23...

# THE FACTS



# THE PARALLEL PROCEEDINGS



## THE DECISION

- Although the dispute with EMC Corporation was not with Mr Petter's direct employer, it "related to" his contract of employment, the Brussels Regulation was thus engaged, and both EMC Corp and its UK subsidiary are to be regarded as his "employers" for the purposes of the Regulation
- The share scheme's exclusive jurisdiction clause (Massachusetts) was of no effect (applying Arts 23 and 25)
- The English court had jurisdiction (applying Arts 20-22)
- Mr Petter was entitled not to be sued other than in the court where he is domiciled
- Granted anti-suit injunction to restrain EMC from pursuing the Massachusetts proceedings – the only way to give effect to Mr Petter's statutory rights

## BUT THAT'S NOT ALL...

- After the English court hearing, but before its decision, EMC went to the Massachusetts court and secured an anti-suit injunction against Mr Petter, and filed a motion for summary judgment
- Mr Petter urged the English court to give its decision quickly and obtained an interim anti-suit injunction against EMC pending that decision
- When the English court delivered its judgment, not only did it order EMC to take no further steps in the Massachusetts proceedings (prohibitory injunction), it also ordered EMC to take reasonable steps to withdraw the motions it had filed in Massachusetts (mandatory injunction) - including its summary judgment application, and to have the Massachusetts anti-suit injunction against Mr Petter discharged
- The English court considered it had little choice to do so - EMC's actions suggested it was in a race to judgment and had attempted to pre-empt the decision of the English court by which it appeared unwilling to abide

## SUMMARY

- The decision gives wide scope to matters “relating to” contracts of employment e.g. separate share schemes with foreign parents can be caught by the Regulation
- The Regulation is likely to apply to any company which provides benefits to employees of associated companies in its group in the EU, if it provides them to reward those employees for the benefit of its employer and the group as a whole
- Foreign parents providing benefits to employees of subsidiaries in Europe will need to consider the issue of jurisdiction carefully. An exclusive jurisdiction clause may be of no effect in the employee’s home court
- Similar to, and applied: *Samengo-Turner v J&H Marsh and McLennan* [2007]
- The case illustrates the length to which the English court will go to apply the Brussels Regulation and assert its jurisdiction, e.g. to grant both prohibitory and mandatory injunctions against proceedings in a forum expressly agreed to by the parties
- The case continues...

## In the pipeline: Modern Slavery Act 2015

- Into force tomorrow – 1 October 2015
- Applies to organisations carrying on all or part of business in UK with minimum turnover of £36m (including subsidiary turnover)
- Requirement to publish statement on website confirming steps taken by business to ensure no slavery or human trafficking in its business or its supply chains
- Government guidance due imminently

# Q & A

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